IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Klahoose First Nation v. Sunshine Coast Forest District (District Manager)***
2008 BCSC 1642

Date: 20081128
Docket: S082076
Registry: Vancouver

Between:

Chief Ken Brown, on his own behalf and on behalf of members of the Klahoose First Nation

Petitioner

And

Brian Hawrys, in his capacity as District Manager – Sunshine Coast Forest District and Hayes Forest Services Limited

Respondents

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Petitioner:	T. Howard B. Stadfeld
Counsel for the Respondent Hawrys and British Columbia (Attorney General):	E.K. Christie J. Oliphant
Counsel for the Respondent Hayes Forest Services Limited:	C.F. Willms K. Grist
Date and Place of Hearing:	June 16-18, 2008 Vancouver, B.C.
Further Written Submissions:	September 10, 17, 24, 30; and October 3 and 6, 2008

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A. Introduction

[1] "A culture," said W. H. Auden, "is no better than its woods."[1] This petition concerns the woods of the Toba River watershed in the traditional territory of the Klahoose First Nation.

[2] The petitioner Ken Brown is the Chief Councillor of the Klahoose First Nation ("Klahoose"). He brings this petition on behalf of all members of Klahoose for judicial review of the decision of the respondent Brian Hawrys, district manager of the Sunshine Coast Forest District (the "district manager"), approving a Forest Stewardship Plan ("FSP") submitted by the respondent Hayes Forest Services Limited ("Hayes"). This impugned decision was made on February 15, 2008.

[3] The FSP relates to a Forest Development Unit ("FDU") that constitutes a small portion of Tree Farm License 10 ("TFL 10"). TFL 10, including the area subject to the FSP, is within Klahoose traditional territory, to which area the Klahoose assert aboriginal title.

[4] The petitioner takes the position that the district manager owed a constitutional and legal duty to consult with Klahoose in good faith, and to endeavour to seek accommodations, prior to approving the FSP for TFL 10, and further, that the district manager failed to comply with this duty. The petitioner seeks a declaration that the FSP approval decision was unlawful, and an order in the nature of *certiorari* quashing it and setting aside the FSP. Alternatively, the respondent seeks an order:

> (i) directing the district manager to consult in good faith, and to endeavour to seek accommodation, in relation to the final FSP, subject to the supervision of this Court;
>
> (ii) in the nature of an injunction restraining the district manager from issuing any further permits, authorizations or approvals to Hayes in relation to forestry operations pursuant to the final FSP, without the prior agreement of Klahoose or further order of this Court; and
>
> (iii) in the nature of an injunction restraining Hayes from carrying out any forestry operations pursuant to the final FSP, without a prior agreement of Klahoose or further order of this Court.

[5] For his part, the respondent district manager (to whom I shall henceforth refer as the "Crown") acknowledges that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the FSP submitted by Hayes. The district manager submits that the Crown discharged that duty in the circumstances of this case.

[6] The respondent Hayes, licensee of TFL 10, takes the position that the consultation conducted in relation to the approval of the FSP met the required tests as set out in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, or if it did not, it is because Klahoose did not meet its own consultation obligations. Hayes further takes the position that as the relief sought is discretionary, it should be denied because the prejudice to Hayes arising from quashing the approval of the FSP far outweighs any prejudice to Klahoose if the FSP approval is not quashed, and moreover the conduct of Klahoose disentitles them to the discretionary relief sought.

[7] The respondents, in short, take the position that they bent over backwards in attempts to consult and accommodate Klahoose, but received very little cooperation in return.

[8] I will begin by reviewing the statutory and administrative framework applicable to the Tree Farm Licence and Forest Stewardship Plan at issue here. I will then review the law concerning the duty of the Crown to consult and accommodate, before turning to the facts of this case in order to apply the appropriate legal principles. For ease of reference, I attach at the end of this judgment a glossary of the acronyms and abbreviations used throughout.

B. The Legislative and Administrative Framework

[9] A tree farm licence is a form of tenure agreement pursuant to s. 12 of the ***Forest Act***, R.S.B.C. 1996, c. 157. It provides the holder rights to carry out forest management on a specific area of Crown land. The right is geographically specific, and amounts to an exclusive right to manage and harvest timber in the TFL area. The annual allowable cut for each TFL is determined by the Chief Forester every five to 10 years pursuant to s. 8 of the ***Forest Act***.

[10] TFL holders are required to fulfill certain operational planning and forest management obligations which include the requirement to prepare a forest stewardship plan (a type of operational plan) in accordance with sections 3 and 5 of the ***Forest and Range Practices Act***, S.B.C. 2002, c. 69 (the "FRPA"). These FSPs are submitted for

approval to the district manager pursuant to s. 16 of the FRPA. These sections provide in part as follows:

> **Forest stewardship plan required**
>
> **3**(1) Before the holder of
>
> (a) a major licence,
>
> (b) a timber sale licence that requires its holder to prepare a forest stewardship plan,
>
> (c) a community forest agreement,
>
> (c.1) a community salvage licence, or
>
> (d) a pulpwood agreement
>
> harvests timber or constructs a road on land to which the agreement or licence applies, then, subject to section 4 (2), the holder must prepare, and obtain the minister's approval of, a forest stewardship plan that includes a forest development unit that entirely contains the area on which
>
> (e) the timber is to be harvested, and
>
> (f) the roads are to be constructed.
>
> …
>
> **Content of forest stewardship plan**
>
> **5**(1) A forest stewardship plan must
>
> (a) include a map that
>
> (i) uses a scale and format satisfactory to the minister, and
>
> (ii) shows the boundaries of all forest development units,
>
> (b) specify intended results or strategies, each in relation to
>
> (i) objectives set by government, and
>
> (ii) other objectives that are established under this Act or the regulations and that pertain to all or part of the area subject to the plan, and

(c) conform to prescribed requirements.

(1.1) The results and strategies referred to in subsection (1)(b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in section 5(1)(b).

(2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:

(a) the timber supply area;

(b) the community forest agreement area;

(c) the tree farm licence area;

(d) the pulpwood area.

(3) A forest stewardship plan or an amendment to a forest stewardship plan must be signed by the person required to prepare the plan, if an individual or, if a corporation, by an individual or the individuals authorized to sign on behalf of the corporation.

…

Approval of forest stewardship plan, woodlot licence plan or amendment

16(1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.

(1.01) A forest stewardship plan or an amendment to a forest stewardship plan conforms to section 5 if

(a) a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter, and

(b) the minister is satisfied that it conforms to section 5 in relation to subject matter not prescribed for the purpose of paragraph (a).

[11] An FSP is a landscape-level planning document which outlines the strategies and results by which the licensee (here Hayes) proposes to conduct its operations within a specified area in order to achieve government objectives. The specified area is

the Forest Development Unit, or FDU. The FSP must be consistent with the objectives of local land-use plans or other objectives such as those set by the Ministry of Environment for species at risk. Where land-use plans are not yet in place, there are legally binding objectives for high-priority biodiversity values such as old-growth, management of streamside areas, maximum cut block size, retention of coarse woody debris and wildlife trees. These objectives are set out in the ***Forest Planning and Practices Regulation***, B.C. Reg. 14/2004, ("FPPR") as well as additional regulations such as the ***General Government Actions Regulation***, B.C. Reg. 582/2004.

[12] Where an FSP incorporates the default result or strategy stated in the FPPR for the relevant values, then approval of those results or strategies is not required by the district manager. Where no default result or strategy is prescribed by the regulations, then approval is necessary.

[13] Approval of an FSP is an initial step in the legislative process leading to timber harvesting in an FDU within a TFL, although it does not itself provide the licensee with authority to harvest timber. The position of the Crown is that approval of an FSP in and of itself has little on-the-ground impact on the exercise of aboriginal rights.

[14] Notwithstanding that position, s. 77.1(1) of the FRPA provides as follows:

> **Power of intervention: first nations**
>
> **77.1**(1) If an operational plan [which includes an FSP] for an area is approved and the minister subsequently concludes, on the basis of information that was not known to the person who granted the approval, that carrying out a forest practice or range practice under the plan will continue or result in a potential unjustifiable infringement of an aboriginal right or title in respect of the area, the minister

> (a) must notify the holder of the plan of the previously unavailable information, and
>
> (b) by order given to the holder of the plan, may vary or suspend to the extent the minister considers necessary one or more of the following:
>
> (i) the operational plan;
>
> (ii) a forest practice or range practice;
>
> (iii) a cutting permit;
>
> (iv) a road permit.

[15] Once a license holder has an approved FSP in place, it may submit applications for cutting permits or road permits to the Minister of Forests and Range. The authorization of these permits is regulated under the ***Forest Act*** in conjunction with the terms of the TFL itself. A cutting permit or road permit authorized by the district manager is required before commencing to harvest the timber in the FDU covered by the FSP. Hayes is in the process of seeking cutting permits to allow it to commence harvesting timber in the FSP by the spring of 2009.

[16] It is important to understand that the right to harvest timber comes from the TFL itself. The FSP is part of the process required for the licence holder to move from having that right to exercising that right. The final step is the cutting permit.

C. The Duty to Consult and Accommodate

[17] As noted, the respondents do not contest that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the

FSP submitted by Hayes. What is at issue is the scope of that duty in the particular circumstances of this case.

[18] I observe that, as will be discussed in more detail below, there is no evidence in the record before me as to what assessment, if any, the Crown made concerning the scope of its duty to consult in this case, other than acknowledging that it had such a duty. Yet, as pointed out by Neilson J., as she then was, in ***Wii'litswx v. British Columbia (Minister of Forests)***, 2008 BCSC 1139, the Crown is obliged to make such an assessment.

[19] The Crown's duty to consult with Klahoose in this case arises from two sources. The first is the Constitution. The second is an Interim Agreement on Forest and Range Opportunities ("FRO") between Klahoose and the province, negotiated through much of 2007, and signed on behalf of the Government of British Columbia on January 23, 2008. Under the FRO, the province provides interim economic accommodation to Klahoose related to provincially authorized forestry operations in Klahoose traditional territory. It also contains an interim consultation protocol.

[20] I will review the constitutional duty to consult first, and then I will set out the relevant parts of the FRO. The FRO will have to be considered again in the context of the steps actually taken among the parties to consult in this particular case.

1. The Constitutional Duty to Consult

[21] The applicable principles begin with s. 35 of the ***Constitution Act, 1982***, which provides as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[22] The historical foundation for the duty to consult and accommodate was described by McLachlin C.J.C. in the ***Haida*** case, *supra* at paras. 25-27:

> [25] Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
>
> [26] Honourable negotiation implies a duty to consult with aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? ….
>
> [27] The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[23] The Chief Justice next considered the scope and content of the duty to consult and accommodate, explaining that

> … the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. [para. 39]

[24] McLachlin C.J.C. then made the following observations:

> [42] At all stages, good faith on both sides is required. A common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised, through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good-faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.
>
> [43] Against this background, I turned to the kind of duties that may arise in different situations. In this respect, the concept of the spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in personal circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice….
>
> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

> [45] Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect a reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[25] In paras. 47-48, the Chief Justice went on to discuss the stage of accommodation:

> [47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good-faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim, and the consequence of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending a final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. at para. 22: "… the process of accommodation of the treaty right may best be resolved by consultation and negotiation".
>
> [48] This process does not give Aboriginal groups of veto over what can be done with land pending final proof of the claim…. Rather, what is required is a process of balancing interests, of give and take.

[26] To determine the extent of the Crown's constitutional duty to consult, then, I must first carry out a preliminary assessment of the strength of the case supporting the existence of the right or title asserted by Klahoose. I must also assess the seriousness of the potentially adverse effect of the FSP on the right or title claimed by Klahoose. On the basis of these assessments, I must determine where on the spectrum of strength of case and adversity of effect this case lies, and come to a conclusion concerning to what

depth of consultation Klahoose was entitled in relation to the decision to approve the FSP. In this regard I note that while the scope of the duty to consult will vary with the circumstances, it "always requires meaningful, good-faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.": ***Taku River Tlinglit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550.

2. The Consultation Protocol

[27] The *Interim Agreement on Forest Opportunities* between the Klahoose First Nation and Her Majesty the Queen and Right of the Province of British Columbia begins with the following recitals:

> WHEREAS:
>
> A. British Columbia and the First Nations Leadership Council, representing the Assembly of First Nations-BC Region, First Nations Summit, and the Union of BC Indian Chiefs ("Leadership Council") have entered into a New Relationship in which they are committed to reconciliation of Aboriginal and Crown titles and jurisdiction, and have agreed to implement a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights.
>
> B. This Agreement is in the spirit and vision of the "New Relationship".
>
> C. Work is underway regarding the implementation of the New Relationship and that this Agreement may need to be amended in the future to reflect the outcomes of that work.
>
> D. The Klahoose First Nation has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy.
>
> E. The Klahoose First Nation has Aboriginal Interests within its Traditional Territory.

> The Parties wish to enter into an interim measures agreement in relation to forest resource development within the Traditional Territory.
>
> F. British Columbia intends to consult and to seek an Interim Accommodation with the Klahoose First Nation on forest resource development activities proposed within the Klahoose First Nation Traditional Territory that may lead to an infringement of the Klahoose First Nation's Aboriginal Interests.
>
> G. The Klahoose First Nation intends to participate in any consultation with British Columbia or a licensee, in relation to forest resource development activities proposed within the Klahoose First Nation's Traditional Territory that may lead to an infringement of the Klahoose First Nation's Aboriginal Interests.
>
> H. British Columbia and the Klahoose First Nation wish to resolve issues relating to forest resource development where possible through negotiation as opposed to litigation.

[28] Of interest, the agreement defines "Operational Plan" as including a Forest Stewardship Plan that has a potential effect in the Klahoose First Nation's Traditional Territory, and "Operational Decision" as meaning "a decision that is made by a person with respect to the statutory approval of an Operational Plan that has potential effect in the Klahoose First Nation's Traditional Territory"

[29] "Aboriginal Interests" are defined to mean "aboriginal rights and/or aboriginal title", while "Traditional Territory" is defined to mean the traditional territory as asserted by the Klahoose First Nation, which includes the entirety of the Toba River watershed, and all of TFL 10.

[30] Article 4 of the agreement provides, in part, as follows:

> 4.0 <u>Consultation and Accommodation Regarding Operational and Administrative Decisions and Plans</u>

4.1 The Klahoose First Nation is entitled to full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational or Administrative Decisions or Plans affecting the Klahoose First Nation's Aboriginal Interests, regardless of benefits provided under this agreement

4.2 During the term of this Agreement, subject to the terms and the intent of this Agreement being met and adhered to by British Columbia, the Klahoose First Nation agrees that British Columbia will have provided an Interim Accommodation with respect to the economic component of potential infringements of the Klahoose First Nation's Aboriginal Interests as an interim measure as a result of forest and range activities occurring within their Traditional Territory

[Klahoose agrees that the government has met its duty to provide interim accommodation with respect to the economic component.]

…

4.5 Nothing in this Agreement restricts the ability of Klahoose First Nation to seek additional accommodation for impact on its Aboriginal Interests from forest resources development within its Traditional Territory.

4.6 The Parties agree to develop consultation processes to address both Operational and Administrative Decisions and Operational Plans, which may affect the Klahoose First Nation's Aboriginal Interests within their Traditional Territory. Appendix B contains an interim consultation process that will apply until the parties have developed the consultation processes noted above, or in the event that they are unable to otherwise agree on any other such process(es).

4.7 In developing such consultation processes, the Parties further agree to address consultation on Administrative Decisions, Operational Decisions and Operational Plans through participation of the Klahoose First Nation in strategic level planning and policy development processes.

[31] By its terms, the FRO took effect on January 23, 2008, for a term of five years. The Interim Consultation Protocol (the "Protocol") is set out in Appendix B to the agreement, and provides as follows:

> 1. Scope and Purpose
>
> 1.1 The government of British Columbia agrees to consult with the Klahoose First Nation on those Operational Decisions, Operational Plans and Administrative Decisions (Decisions) which may affect the Aboriginal Interests of the Klahoose First Nation in accordance with the process set out in this consultation protocol, except for the Economic component of those interests which the parties agree are addressed to the extent set out in section 3.0 of the Forest and Range Opportunities Agreement.
>
> 1.2 This Protocol fulfills section 4.6 of the Interim Agreement on Forest and Range Opportunities (FRO) and will apply to all Operational and Administrative Decisions made by the Ministry of Forests and Range (MFR) which may affect the Klahoose First Nation's Aboriginal Interests within their Traditional Territory.
>
> 1.3 This Protocol applies to the provincial Crown lands in the Traditional Territory as defined in the FRO, including any Administrative Decisions that would result in private lands being deleted from a Tree Farm License.
>
> 2. Definitions
>
> 2.1 The definitions set out in section 1 of the FRO apply where those defined terms are used in this Protocol, and for greater certainty, will continue to apply in this Protocol after the expiry or termination of the FRO unless the Parties to this Protocol otherwise agree;
>
> 2.2 "Response Period" means a period of up to 60 days from the initiation of the process set out in section 3.2 of this Protocol, where the initiation date is the date on which Klahoose First Nation receives information regarding the proposed Administrative Decision or Tiber Supply Review process, or a copy of the Operational Plan for review. Where an emergency operation arises and/or expedited salvage has to occur, MFR will communicate the nature of the emergency to

the Klahoose and, if required, a shortened initial Response Period, that is consistent with The *Forest and Range Practices Act* (FRPA) emergency public review requirements.

2.3 A reference to the "Ministry of Forests and Range" or "MFR" in this Protocol includes, as appropriate, a reference to a Minister, Deputy Minister, Regional Executive Director, Timber Sales Manager, District Manager or any of their designates.

3. Consultation Process

3.1 General

The parties acknowledge that the scope of the duty to consult and, where appropriate, accommodate, will respect and meet the standards set out in the SCC *Haida* Decision and acknowledge that the duty exists on a spectrum and is proportionate to a preliminary assessment of the strength of the Aboriginal Interest(s) and to the seriousness of the potential effect.

3.1.1 Notification of initiation of consultation with appropriate information will be sent to: Chief Councillor Ken Brown. Any replies to MFR consultation by the Klahoose First Nation will be sent to Allan Shaw unless otherwise agreed by the Parties.

3.1.2 During the term of the FRO, Klahoose First Nation agrees to fully participate in the consultation process as set out in this consultation protocol, and thereafter as the Parties may agree.

3.1.3 MFR agrees that Klahoose may request further information and/or meetings with MFR, the licensee or another Provincial agency with relevant information or expertise, as part of the consultation process under this protocol. Klahoose agrees that, in the event it does required further information or meeting, it will make best efforts to ensure that such request does not unreasonably delay the consultation process.

3.1.4 MFR agrees to initiate the consultation process at the earliest practical opportunity to provide the Klahoose First Nation with a reasonable opportunity to engage in the consultation process before a decision is made concerning the forestry activity;

3.1.5 Klahoose agrees to provide a response to a notification pursuant to clause 3.1.1 within the Response Period. In that response Klahoose will

indicate whether it has sufficient information to provide Klahoose's input regard the subject matter of the consultation, or whether additional information and/or meetings with MFR, other Provincial agencies and/or the licensee are required. If so the parties will agree on a further time period in which to conduct consultation.

3.1.6 Where no response is received within the Response Period, MFR may conclude that Klahoose First Nation does not intend to respond or participate in the consultation process and a decision by MFR will proceed.

3.1.7 This Protocol and its processes are not intended to constrain MFR or Licensee's relationship with Klahoose First Nation and other opportunities may be taken to enhance the relationship.

3.1.8 The Parties acknowledge that FDP/FSP will be consistent with approved land use plans when higher-level plan objectives have been established.

3.2 Information Sharing

The parties agree that information sharing constitutes the beginning of the consultation process.

3.2.1 MFR or the Licensee will

3.2.1.1 Send a notification letter advising Klahoose First Nation of the proposed Decision required and the relevant response period.

3.2.1.2 Provide maps and other information relevant to the proposed Decision to Klahoose First Nation.

3.2.1.3 Offer to meet with Klahoose First Nation to discuss information regarding the proposed decision, Aboriginal Interests and cultural heritage resources, and how these interests may be affected by the proposed Decision and to discuss practical means for addressing the interest and concerns raised.

3.2.1.4 For operational plans, provide to Klahoose First Nation a copy of the plan submitted to the District Manager for a Decision, a description of how the Aboriginal Interests and cultural heritage resources have been considered, and will provide an opportunity

for Klahoose First Nation to provide further comments.

3.2.1.5 For Administrative Decisions, meeting at mutually agreed to times throughout the year to provide an opportunity for Klahoose First Nation to make known to representatives of the government of British Columbia their concerns and comments relative to the effects of the Administrative Decision(s) within the Traditional Territory.

3.2.1.6 The Klahoose First Nation may develop suggested information sharing practices that may be adopted by licensees when reviewing Forest Stewardship Plans with Klahoose First Nation.

3.2.2 Klahoose First Nation or their designate will

3.2.2.1 Agree to participate in the consultation process initiated by MFR or the Licensee;

3.2.2.2. Be responsible for conducting their own internal review of the information provided by MFR or the Licensee as part of the information sharing as outlined in section 3.2.1;

3.2.2.3 Provide information to MFR or Licensee regarding the scope and nature of Aboriginal Interests or cultural heritage resources and how these Interests or resources may be impacted by the proposed decision through written submission or meeting with MFR or as mutually agreed to under section 3.1.5.

3.3 Further Consultation and Accommodation As Appropriate

3.3.1 Where appropriate, <u>further consultation meetings may occur</u> to discuss First Nation issues identified in section 3.2.2.3 and potential measures to address those concerns, as appropriate

3.4 Decision

3.4.1 Where Klahoose First Nation requests additional relevant information, <u>the decision maker will make reasonable efforts to provide available information from the Licensee or through MFR, recognizing that the decision make may not have access to certain</u>

> licensee information. MFR will nonetheless encourage and recommend that the Licensee provide information that is requested by Klahoose where it is practical for the Licensee to do so.
>
> 3.4.2 Decision maker will make the Decision considering all the relevant information provided by Klahoose First Nation during the consultation process
>
> 3.4.2.1 For Aboriginal Interests raised during the review of Administrative Decisions that cannot be addressed at the Administrative Decision stage the decision make will provide the Aboriginal Interest information to the appropriate decision make for consideration in further operational decisions.
>
> 3.4.2.2 Prior to issuing a road permit, cutting permit or proposed timber sale, the decision maker will consider any existing or new information regarding Aboriginal Interests and impacts on Aboriginal Interest that is provided by Klahoose First Nation, and will ensure that consultation process has been adequate.
>
> 3.4.2.3 MFR will communicate the results of the decision to Klahoose First Nation in writing after the decision is made.

[32] It will be observed that the Consultation Protocol incorporates the standards set out in the ***Haida*** case, *supra*. Counsel for Klahoose submitted that the Protocol goes further by setting out what is, in effect, a minimum level of consultation required of the Crown. I agree, but would add that the Protocol sets minimum standards for both parties. It does not change the analysis one must go through in assessing the scope of the constitutional duty to consult, as discussed above, but it does provide a useful yardstick.

D. The Standard of Review

[33] As Madam Justice Neilson observed in ***Wii'litswx***, *supra* at paras. 11-13, the subject of judicial review in a case such as this is not really the district manager's decision to approve the FSP. Rather, what must be reviewed is the conduct of the Crown with respect to the fulfillment of its duty to consult Klahoose and to accommodate Klahoose's interests in the course of making that decision.

[34] As mandated in the ***Haida*** case, *supra*, the *extent* of the duty to consult or accommodate is a question of law to be judged on the standard of correctness, although it is capable of becoming an issue of mixed law and fact to the extent that the appropriate standard becomes that of reasonableness. The *adequacy* of the consultation process is governed by a standard of reasonableness. With respect to this second aspect, I propose to follow the lead of Neilson J. (see ***Wii'litswx***, *supra* at paras. 16-17) and address first the adequacy of the process of consultation, and secondly, the adequacy of any resulting accommodations.

E. Strength of Claim: The Klahoose in the Toba River Watershed

[35] Where title to lands formerly occupied by a First Nation has not been surrendered, as is the case here with the Klahoose traditional territory, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, have given rise to the right to continue those practices in today's world. Aboriginal title, which is based on occupancy of the land at the time of British

sovereignty, is one of these various aboriginal rights: see ***R. v. Marshall; R. v. Bernard***, [2005] 2 S.C.R. 220 ("***Marshall-Bernard***"); ***R v. Van der Peet***, [1996] 2 S.C.R. 507.

[36] It is, of course, not for me in this proceeding to decide the validity of Klahoose's claim to aboriginal title and rights over its traditional territory. I must simply do my best on the evidence to assess, on a preliminary basis, the apparent strength of the case supporting the existence of Klahoose's asserted right or title.

[37] In doing so, I bear in mind the test for the establishment of title set out in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, which requires claimants to prove exclusive pre-sovereignty occupation of the land by their forebears: ***Marshall-Bernard***, *supra* at para. 55. As noted by the Chief Justice in ***Marshall-Bernard***, *supra* at para. 58:

> It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet, Nikal, Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, *the season over, they left, and the land could be traversed and used by anyone*. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights. [Emphasis added.]

[38] With these principles in mind, my review of the evidence discloses the following.

[39] The Klahoose are a Coast Salish people who constitute an "Indian Band" under the ***Indian Act***, R.S.C. 1985, c. I-5, with approximately 300 members. Their traditional territory covers lands and waters in the northern Gulf Islands area of the coast of British Columbia. It includes a portion of Quadra Island, Cortes Island, the Redonda Islands, and the Desolation Sound area. Its main village is on Klahoose Indian Reserve #7 ("IR #7"), at Squirrel Cove on Quadra Island.

[40] This territory was outlined in a map attached to the territorial claim (Statement of Intent) submitted by Klahoose on August 29, 1994, to the treaty negotiation process administered by the B.C. Treaty Commission.

[41] The backbone of the territory, its central axis, is formed by the Toba Inlet and the Toba River Valley. The Toba River watershed constitutes and indeed defines a substantial portion of Klahoose traditional territory.

[42] The territory's largest Indian Reserve, Klahoose IR #1, is located at the mouth of the Toba River where it enters Toba Inlet, and extends approximately 7 km up the Toba River Valley. It is not presently occupied.

[43] Kathy Francis is the Chief Treaty Negotiator and a Band Councillor for the Klahoose First Nation. She has previously served as Chief Councillor. As Chief Treaty Negotiator, she has had to learn and understand Klahoose oral history, and has personally studied the oral history as passed on by Klahoose elders for that purpose. These elders include Joe Mitchell, Sue Pielle and Rose Barnes.

[44] According to Ms. Francis, the Toba River watershed has always been an area of central importance to the Klahoose. Historically, the nation's primary village site was located near the mouth of the Toba River. The village, Tl'émtl'ems ("many houses") forms part of the area established as Klahoose IR #1, and was last occupied in the 1950s.

[45] In addition to this main village site, the Klahoose maintained smaller villages and housing sites all along the Toba River upstream (east) of IR #1 and along the north shore of Toba Inlet near the Tahumming River, west of IR #1. There have been no permanent residents in the watershed since 1979. There are a number of burial sites and pictographs in the area.

[46] Ms. Francis deposes that the Klahoose have always relied on the lands, waters and resources of the Toba River watershed to support themselves culturally, economically and spiritually. They harvested and managed the resources of the watershed for domestic and trading purposes, including harvesting cedar and spruce for dwellings, canoes, weapons, household items, clothing, etc.; hunting and trapping deer, mountain goats, bears, squirrels, lynx, raccoons and other animals; fishing for salmon, groundfish, prawns, eulachons, trout and other species at various locations throughout the watershed and the shoreline of Toba Inlet; gathering shellfish and other marine resources such as kelp; maintaining defensive positions against raiding parties; and creating food caches and places to store other harvested resources. The watershed and Toba Inlet were also the main traveling routes for trading with neighbouring nations and for traveling to other places within Klahoose territory.

[47] According to Klahoose oral history, there are battle sites within the Toba River watershed where the Klahoose defended their territory from incursions by other nations, including the Tsilhqot'in people who attacked from the Interior through the mountains at the headwaters of the watershed, and the Kwakiutl and Haida people who would raid by canoe up Toba Inlet.

[48] Ms. Francis deposed that while the location of Klahoose villages changed over time, members continued to hunt, fish, trap and harvest forest resources from the watershed throughout the 20th century. During the time when Klahoose children were being sent to residential schools, Klahoose members would leave Squirrel Cove with their children, and go to the Toba River watershed to hide them away.

[49] Ms. Francis noted that there has never been a comprehensive survey or study to locate all the Klahoose cultural and archaeological sites in the Toba River watershed. Counsel for the petitioner advised me that there was "rock solid" evidence to come, presumably in the treaty negotiation process. It was not available to me.

[50] In addition to the oral history related by Ms. Francis, there was available to me a report dated February 27, 2007, prepared by Tracy Bulman of the Aboriginal Research Division, Legal Services Branch, Ministry of the Attorney General, for the Ministry's Aboriginal Law Group, entitled **Klahoose First Nation**, and subtitled *Research in support of a preliminary assessment of strength of claim for the Klahoose First Nation* (the "research report"). This report corroborated much of what Ms. Francis related by way of oral history, although according to Ms. Francis, its author did not conduct any

interviews with Klahoose elders or members, or otherwise seek any input from the Klahoose.

[51] With respect to the traditional use of land and resources, the research report notes that fishing was an integral part of Klahoose culture and livelihood, with salmon by far the most important fish in this respect. Pacific herring was also important. There was evidence that shellfish were gathered by the Klahoose year-round, and that deer were the most frequently hunted land mammals. Socially, economically and ritually, the most prestigious animals hunted on the mainland were mountain goats, which required a highly specialized skill. The ranking family of the Klahoose were great goat hunters who enjoyed a special prerogative to use the mountain goat head mask during winter ceremonials. Mountain goat hunting, of course, took place in the upland areas of the mountainous Toba River watershed.

[52] The research report also noted evidence that plant gathering was another important source of nourishment, and that specific gathering sites "belonged" to certain families with possession of these rights passing to the eldest son.

[53] Red cedar was used extensively to make everything from canoes to houseplants, barbecuing sticks, salmon spreaders, drying racks, fish traps and bowls.

[54] There were different kinds of housing built by the Klahoose, depending on the season and on a family's wealth. Shed housing was built by the wealthy at their summer campgrounds, while poorer families used this sort of housing year-round. Generally, wealthier families used cedar planks in the walls and poorer families used

bark slabs. Winter housing was constructed in different formats, with only the framework being permanent. Family crests were carved on the winter houses and 40 foot high totem poles were erected in front in commemoration of the dead. Underground houses were made with pits approximately 10 feet deep, where protection was thought necessary.

[55] Social organization consisted of groups of extended families which came together to form winter villages. One of the defining features of Klahoose social, political and economic organization was the exclusive control over particular hunting and gathering sites within their territory. Title to hunting and gathering sites was usually retained within a given family, and was passed from headman to headman (usually from father to son). Permission to hunt and gather in traditional family-owned sites was sought by others who wished to use those areas. Access to, and use of, particular sites could be gained through marriage, but ownership was inherited. Family ownership and control of summer resorts and hunting and gathering sites was a foundation of Klahoose society.

[56] The research report quotes ethnographic sources as indicating that at the time of contact, the Klahoose lived primarily in the protected waters in and around Toba Inlet. Sources identify 17 former Klahoose village sites located in the area of Toba Inlet and the Toba River Valley. These include Náath'úwem, approximately 10 miles upstream from the mouth of the Toba River, which contained plank houses built partially underground due to fear of Tsilhqot'in raiding parties, Xwéthéyin, on the mouth of the Little Toba River, where spring salmon spawned, and Nísh7uuthin on the east side of

the Toba River, where cranberries were gathered. The report goes on to note the following:

> Although the ethnographic sources do not reveal evidence of specific upland sites traditionally used by the Klahoose, it is very likely that intensive aboriginal use occurred in these areas. The variety of animals, plants and foods that were hunted and gathered by the Klahoose speaks to the fact that they regularly utilized upland areas. There are very likely many traditional sites that were simply not recorded because white men did not travel to those areas to observe the Klahoose there. The material culture recorded by Barnett suffices as evidence that the Klahoose did indeed utilize upland locations. There is a high probability these areas fell within [Klahoose traditional territory].

[57] Interestingly, it appears that it was not until the coming of the Europeans brought an end to raids into Klahoose territory from the Tsilhqot'in and the Kwakiutl that the Klahoose expanded their territory out of the Toba River and Inlet into the Strait of Georgia. A permanent settlement at Squirrel Cove on Cortes Island was not established until the mid to late 1800s.

[58] On the basis of the evidence before me, I find that Klahoose has established on a balance of probability the following:

- a strong *prima facie* case for aboriginal rights, and an arguable case for aboriginal title, throughout the entirety of the Toba River watershed, including all of TFL 10;

- a strong *prima facie* case for aboriginal title to the shores of the upper reaches of Toba Inlet, and to the floor of the Toba River Valley;

- a reasonable *prima facie* case for aboriginal title to the upland areas immediately surrounding the Toba River Valley and the valleys of Toba River tributaries, including those portions that make up the FDU covered by the FSP.

[59] In this regard I note that it is exactly those upland areas on either side of the floor of the Toba River Valley, through which flow the tributaries that feed the river, and which include the mountain goats' winter range, where the evidence suggests that the Klahoose had exclusive use and occupation of the kind discussed in the ***Marshall-Bernard*** case, as opposed to seasonal use that left the land open to all comers in the off-season.

F. Potential Adverse Effect: Klahoose Territory and TFL 10

[60] TFL 10 covers almost the entirety of the Toba River watershed. The FDU covered by the FSP in question is, of course, within TFL 10. It covers a much smaller area from the headwaters of Toba Inlet, south of IR #1, and thence east beyond IR #1 another 12 km or so up the Toba River Valley to the junction of the Toba and Little Toba Rivers. This is the very heart of Klahoose traditional territory.

[61] TFL 10 was originally issued by the provincial Crown to Timberland Development Co. in 1951. Its original boundaries included not only the entire Toba River watershed, but also areas located on the north and south sides of Toba Inlet. It was subsequently partitioned so that those parts outside of the Toba River watershed were severed from the licence area.

[62] In 1982, TFL 10 was acquired by Weldwood of Canada. At that time, Weldwood held a permit, issued under the ***Indian Act***, to use a road that runs through Klahoose IR #1. Logging in the Toba River watershed was accessed through a series of logging roads all of which led down to this main road passing through IR #1. All logging in the watershed area had to pass through IR #1 in order to get to water that was deep enough to permit the offloading of logs into booms in Toba Inlet. Without access through IR #1, logging in the watershed was impracticable.

[63] Weldwood's road use permit expired in 1988. Klahoose advised Weldwood that they would not issue a long-term permit renewal for access through IR #1. Instead, Klahoose offered a permit for a one-year term subject to Weldwood assisting Klahoose in paying for an environmental impact assessment of Weldwood's forestry activities in the watershed. Weldwood refused that offer, and their permit was not renewed. As a result, there have been no commercial forestry operations in the Toba River watershed since 1988, a period of 20 years.

[64] Klahoose proceeded with a study of the watershed that looked at the cumulative impact of Weldwood's logging, as well as other existing or proposed uses of the watershed, such as big game hunting and proposed bulk water exports. As a result of this study, Klahoose concluded that the forest in the watershed had been harvested at an unsustainably high rate, and needed time to regenerate. In the meantime, the roads and bridges that constituted the logging road network in the watershed began to deteriorate as they were no longer maintained by Weldwood.

[65] In 1994, Weldwood transferred its interest in TFL 10 to International Forest Products Ltd. ("Interfor"). Interfor was able to carry on with logging on those parts of TFL 10 that were outside of the Toba watershed and which were severed. Like Weldwood, however, Interfor was unable to carry out forestry activities within the watershed area because of the lack of any access through IR #1.

[66] Both Weldwood and Interfor offered substantial annual payments for the right to use the road through IR #1. Klahoose declined these offers in the absence of agreements that provided for co-management with Klahoose, which agreements were not forthcoming.

[67] In June of 2006, the respondent Hayes purchased the watershed portion of TFL 10 from Interfor for a nominal sum. It did so with full knowledge of the problem arising from the lack of access through IR #1. Indeed Hayes had been involved in the area for some time, acting as the contractor responsible for providing forestry services to both Weldwood and Interfor in relation to TFL 10. The situation nevertheless has remained the same: the Toba River watershed has remained free of commercial forestry operations for 20 years.

[68] In these circumstances, I have no hesitation in concluding that the potential adverse effect upon the aboriginal interests of the Klahoose of approving a Forest Stewardship Plan for a Forest Development Unit that is set in the heartland of Klahoose traditional territory is serious indeed. It matters not that the FSP is but one step in the process of moving from obtaining the right to harvest timber granted by the TFL, to exercising it. Any step in that process carries the potential of adversely affecting

Klahoose aboriginal interests to a serious degree. This is clearly contemplated by the scheme set out in the FRO and Protocol.

G. Conclusion on the Scope of the Duty to Consult

[69] It follows from my findings concerning the strength of Klahoose's claim and the seriousness of the potential adverse effect of the FSP on Klahoose's aboriginal interests that the extent of the Crown's duty to consult and accommodate falls towards the higher end of the spectrum described by the Chief Justice of Canada in ***Haida***.

[70] Bearing in mind the need for flexibility and individuality in determining what the expected level of consultation required of the Crown in this particular case, I will now review in some detail the history of dealings among the parties in relation to this FSP.

H. Klahoose Interaction with Hayes and the Crown

[71] As contractor responsible for providing forestry services to both Weldwood and Interfor in relation to TFL 10, Hayes had been involved in meetings with representatives of the Klahoose since 2001, by which time two things were apparent: first, the system of roads and bridges within the Toba watershed had deteriorated and would have to be replaced before any further harvesting could take place there; and second, there was by this time a viable volume of timber available within the watershed that had not yet been accessed.

[72] As a leading independent forest services provider in British Columbia, Hayes values its relationship with First Nations, whom it regards as potential customers for its forest services, and potential joint venture partners in forest resource development and

harvest. In 2001, Hayes had a number of meetings with representatives of Klahoose to discuss opportunities in the Toba watershed to be leveraged from negotiation of a renewed access agreement. Klahoose made it clear that its aim was to develop a long-term vision for the future, based on a balance between social, cultural and economic needs based on the resources that lie within its territories.

[73] Nothing came of these discussions, and they were not meaningfully renewed until Hayes had reached agreement in principle with Interfor to purchase TFL 10. According to Hayes, it formed the view that the best way to advance forestry operations within the Toba watershed was to include Klahoose directly in some kind of joint venture. This was raised with Klahoose on June 16, 2006, and was discussed at meetings between Hayes and Klahoose on October 5 (Duncan) and November 2, 2006 (Squirrel Cove).

[74] At that time, Klahoose was engaged in negotiations with Plutonic Power Corporation regarding the construction and operation of a run-of-the-river independent power project at Montrose Creek and East Toba River, further up the Toba River Valley to the northeast of where the FDU is now situated. Part of the Hayes proposal in 2006 noted the opportunity to take advantage of the fact that Plutonic needed to build roads to access the proposed facilities, which could also be used for logging if they were built to the appropriate standards.

[75] Klahoose then concentrated on its negotiations with Plutonic. These negotiations, which included Klahoose's involvement in the review, design and

assessment stages of the project, were concluded in early 2007. In April of 2007, the petitioner Ken Brown was elected Chief Councillor.

[76] On May 15, 2007, Chief Brown wrote to the Minister of Forests and Range protesting the lack of consultation and accommodation in relation to the transfer of TFL 10 from Interfor to Hayes. Among the points made by Chief Brown were the following:

> The area of TFL #10 is located entirely within the Klahoose traditional territory to which the Klahoose claim aboriginal rights and title.
>
> The Klahoose First Nation has not and will not permit Hayes or any other company access to the Toba Valley through our reserve for the purpose of logging TFL #10.
>
> The TFL has been inactive for the last 20 years due to Klahoose closing access to it through our reserve. It is the intent of the Klahoose First Nation to secure the TFL in order to conduct a sustainable logging operation that will benefit our people in perpetuity.

[77] Unaware of this correspondence, Hayes met with Klahoose in Campbell River on May 17, 2007, expecting a continuation of discussions regarding joint venturing opportunities with respect to forestry operations in the Toba River watershed. Chief Brown opened the meeting, however, by advising that Klahoose was not prepared to negotiate with Hayes regarding forestry operations in TFL 10. He expressed the view that Klahoose had their own internal capacity to operate TFL 10, and as it formed part of their traditional territory, it was their intention to conduct any and all future forestry operations within it. To that end, Klahoose was interested in acquiring TFL 10 from Hayes, but had no interest in discussions concerning access for Hayes, or pursuit of a business relationship with Hayes. With respect to access, Klahoose maintained the same position as they had with Interfor and Weldwood.

[78] Thereafter, a stalemate developed. In essence, Klahoose maintained the position that nobody but the Klahoose First Nation would harvest timber in their traditional territory under TFL 10, that it would oppose any efforts by Hayes to harvest timber in the Toba River Valley, that it would continue to deny access through IR #1, that TFL 10 was therefore of no commercial value to Hayes, and that the purchase of TFL 10 by Klahoose was the only viable option.

[79] Hayes maintained that it was open to any reasonable offer for TFL 10, but that any such offer would have to take into account both Hayes' ownership, and its contract to provide forestry services for the TFL. In the absence of a reasonable offer, Hayes intended to work diligently to develop the commercial value of TFL 10, and to pursue other access options.

[80] I sense that the parties had rather different views as to the appropriate value of TFL 10.

[81] I pause to observe that, while Klahoose's expressed desire to have exclusive control of the harvesting of timber in the Toba River watershed is both understandable and commendable, Klahoose has no legal right or entitlement to such control (pending the conclusion of a treaty) in the absence of acquiring the rights under TFL 10 from Hayes. On the other hand, Klahoose is entirely within its rights to deny access to the watershed through IR #1 to Hayes or anyone else.

[82] In the meantime, beginning in May of 2007, Klahoose began negotiating the terms of its FRO with the Ministry of Forests and Range.

[83] Then on July 3, 2007, Hayes submitted its forest stewardship plan (the "draft FSP") for TFL 10 to the ministry. By letter dated July 5, 2007, Hayes provided a copy of the draft FSP submission to Chief Brown, noting:

> In our June 15 letter, we advised that we intended to proceed with exploring our options and working to build the commercial value of the TFL. We further committed to both keeping you informed on our progress, and to remaining prepared to carefully review and consider any offer in respect of the TFL from Klahoose. We remain open to your suggestion \as to a reasonable time for you to prepare an offer to purchase the TFL.
>
> In the interim period, we have decided to submit a limited area forest stewardship plan (FSP) for the TFL. We have enclosed a copy of our submission for your convenience. The public review and comment period for this FSP will be July 9, 2007 to September 6, 2007 inclusive. As you are likely aware, the FSP may be changed as a result of written comments received during the review and comment period.
>
> We would be pleased to meet with you to discuss the FSP and invite you to contact us at your convenience.
>
> For greater certainty, notwithstanding that we are submitting an FSP for approval, we remain committed to working with you to pursue a sale and purchase of the TFL.

[84] On July 17, 2007, the Ministry through Chuck Anderson of the Sunshine Coast Forest District ("SCFD") wrote to Chief Brown concerning Hayes' FSP, and it is here that we come to the start of the "record" (the information) that was before the Crown when it came to make the impugned decision approving the FSP. The letter included the following reference:

> Under Section 21 of the Forest Planning and Practices Regulation, FSP proponents must make reasonable efforts to meet with First Nations groups that may be affected by the plan to discuss the plan.
>
> As with Forest Development Plans, government has an obligation to consult with First Nations that may be affected by a FSP. It is our expectation that for First Nations that are signatory to an agreement that

> stipulates a consultation timeframe based on submission of operational plans to them [i.e. an FRO], the consultation period will commence upon receipt of the FSP from the plan proponent. For First Nations that do not have such agreements, consultation will be deemed to begin with notice of a FSP provided by the plan proponent.
>
> We would like to meet with you to discuss the FSP and any potential affect the FSP may have on your aboriginal interests. We are willing to participate in meetings between yourselves and the licensee and/or will meet with you separately. We are also willing to meet with you to further explain the FSP process.

[85] In September and October of 2007, there were meetings between Klahoose and the Ministry concerning the negotiation of the FRO. The draft FSP was not discussed. Meanwhile, exchanges between Klahoose and Hayes included entering into a confidentiality agreement regarding the receipt of information concerning TFL 10, and Klahoose's expression of dismay that Hayes would be actively working to ramp up operations in an area that Klahoose wished to protect against the threat of unsustainable logging, accompanied by a further warning that no access would be permitted through IR #1.

[86] On October 9, 2007, Klahoose wrote to the Ministry to the attention of Jim Gowriluk, Regional Executive Director, Coast Regional Office, raising concerns about, among other things, the draft FSP. Klahoose expressed the position that consultation was not possible as there was "inadequate information available upon which meaningful consultation could occur", and further raised the concern that the planning and inventory information upon which the draft FSP was based was significantly out of date and not representative of current conditions within TFL 10 (there having been no logging for 20 years). The letter, which was copied to Hayes, went on to state:

> This problem is compounded by the fact that the FSP is proposed to apply to only a small portion of Toba Valley. The Toba Valley watershed is, and always has been, of central importance to Klahoose. It lies at the heart of Klahoose territory, and has been protected by Klahoose from development for several decades. The proposed initiation of industrial logging in the watershed must be addressed in a manner that permits Klahoose to evaluate the implications of the operations for our title, rights and interests throughout the watershed, an approach that is directly frustrated by the compartmentalized approach to FSP planning taken by Hayes.
>
> ….
>
> In conclusion, after decades of conflict with MOF and the various licensees of TFL 10, Klahoose is actively trying to acquire this tenure and, in doing so, resolve conflicts and pursue economically and environmentally sustainable forestry. From our perspective this will create a real forward-looking solution that results in a win-win for all. In the interim, we are expecting that the Crown meet its lawful obligations to us before purporting to take steps to operationalize this long inactive tenure without adequate consultation.

[87] On October 15, 2007, Hayes faxed a letter to Chief Brown requesting a meeting to discuss the Klahoose letter to the Ministry of October 9. In anticipation of the meeting, Hayes requested advice as to what additional information Klahoose required, the precise area to which Klahoose claimed title, and what Klahoose meant by "sustainable forest management".

[88] By letter dated November 1, 2007, Chuck Anderson of the SCFD wrote to Chief Brown requesting a meeting to discuss the FSP and any potential effects it may have upon Klahoose's aboriginal interests. There was no reference to Chief Brown's letter of October 9, which Mr. Anderson presumably had not seen.

[89] The Ministry responded by letter dated November 27, 2007, from Mr. Gowriluk of the Coast Forest Region, who indicated that the Ministry intended to consult with the Klahoose First Nation on the proposed FSP for TFL 10, and that the Sunshine Coast

Forest District had initiated such consultation through its July 17, 2007 letter. Mr. Gowriluk advised that the SCFD remained open to meet with Klahoose representatives to discuss the FSP and any potential effect it may have on their aboriginal interests. Mr. Gowriluk also thought it would be appropriate to meet to discuss the ways in which the Ministry and the licensee may be able to provide further information about the proposed operations under the FSP over time, and asked Chief Brown to contact Al Shaw, tenures officer, SCFD, to arrange a meeting.

[90] Klahoose responded by letter of December 6, 2007, to Mr. Shaw of the SCFD, enclosing a copy of the earlier correspondence to Mr. Gowriluk. Chief Brown wrote:

> As the enclosed correspondence indicates, the proposed FSP relates to an area of central importance to the Klahoose First Nation. We have serious reservations about sufficiency and accuracy of the information contained in, or relied on in preparing, the FSP. As well, we are concerned that the FSP indicates a "piecemeal" approach to resource planning in our territory. Any decision to restart industrial forestry in TFL 10 must be made on the basis of reliable and sufficient information, that enables us to assess and understand what is proposed, as well as evaluate the implications of Hayes' activities for our aboriginal title and rights. These conditions are not presently in place.
>
> We are prepared to meet with you and other MOF representatives to discuss our concerns. We wish to be clear that this meeting will be a first step in the consultation process, and that we expect MOF to honour its obligations to meaningfully consult with and accommodate Klahoose prior to making a decision on the draft FSP.

[91] In the meantime, on November 28, 2007, Hayes had submitted a revised draft of the FSP to the Ministry for approval. Neither it nor any subsequent redraft was copied to Klahoose before the final approval.

[92] On December 13, 2007, Klahoose and the Ministry reached a final agreement on the FRO, including the interim consultation protocol. Chief Brown signed the FRO on behalf of Klahoose on December 14, 2007, and it became effective when signed by the Minister on January 23, 2008.

[93] On December 17, 2007, a meeting took place between Klahoose and Hayes. The Ministry was not involved, and both sides were accompanied by legal counsel. The main subject was the desire of Klahoose to acquire TFL 10 from Hayes, and Klahoose proposed a 90 day "cooling off" period, during which Hayes would not carry out any activities in TFL 10, and Klahoose could obtain the appropriate information it needed to present an offer. Hayes declined this proposal, but said that it would carefully consider any reasonable offer. Klahoose was upset that Hayes was continuing to operationalize the area in view of Klahoose's concerns, and also took exception to a suggestion from Hayes that it would look into using barge access up the Toba River in lieu of road access. The meeting ended with the parties remaining at stalemate.

[94] On December 18, 2007, Klahoose met with Al Shaw and Chuck Anderson of the SCFD. Klahoose takes the position that this meeting was, in essence, the start of the consultation process. Klahoose expressed a number of concerns about the draft FSP (they had not seen the latest draft). These concerns were based on three principal objections: the piecemeal approach (the FSP covered only a small part of TFL 10 consisting, as noted, of the heart of Klahoose traditional territory), the lack of up-to-date information, and the lack of on-the-ground specifics. In their mind, these deficiencies prevented them from understanding adequately how the whole TFL, across which

Klahoose had obvious interests, would be affected, and how Hayes' plans would impact such matters as the salmon fishery habitat in the watershed, the wildlife habitats and old growth, and the protection of Klahoose cultural heritage resources.

[95] Mr. Shaw and Mr. Anderson noted in response that under the legislation and regulations, the draft FSP did not have to set out much of the information Klahoose sought, and was not required to cover the entire TFL. They pointed out that there would be other steps before harvesting could commence where further consultation would take place.

[96] At the conclusion of the meeting, it was agreed that Klahoose would provide a written statement of its concerns, and information about Klahoose traditional use in the watershed, by early January, 2008. Immediately following the meeting, counsel for Klahoose wrote to the Ministry (Mr. Shaw) to request clarification on certain points, including the Minister's ability "to meaningfully consider and act on information provided by Klahoose in relation to various aspects of the draft FSP, [given that] the scheme requires the Minister to approve the FSP where an RPF [Registered Professional Forester] employed by Hayes has certified its contents." Information concerning the treatment of cultural resources was also requested.

[97] The Ministry (Chuck Anderson) e-mailed Klahoose later on December 18, 2007, to provide some of the information that Klahoose had sought, and Mr. Shaw also wrote on December 21, 2007. In his letter, Mr. Shaw confirmed that although cultural heritage resources were one of the elements that had to be the subject of a result or strategy in the proposed FSP, and therefore required district manager review and approval, the

FPPR excluded from this process those cultural heritage resources that were regulated under the *Heritage Conversation Act*. Mr. Shaw went on to say:

> When making a determination of whether or not the result or strategy for cultural heritage resources is consistent with the objective for cultural heritage resources, the decision-maker will consider any cultural heritage resource information provided by the First Nations. The decision could be that the result or strategy is consistent or it could provide further direction to the plan holder or it could be decided that it is not consistent with the objective and not approved as such.

[98] The written statement promised by Klahoose at the meeting of December 18, 2007, was provided in the form of an eight-page letter dated and faxed January 9, 2008, from Klahoose's legal counsel, Mr. Howard, to Mr. Shaw of the SCFD. It was not copied to Hayes.

[99] In his letter, Mr. Howard took the position that the Ministry should not approve the draft FSP, based on three arguments. The first was that the Ministry lacked the authority to approve the draft FSP because Klahoose has aboriginal title and rights to the lands, waters and resources contained within TFL 10, thus British Columbia lacked jurisdiction. This was based upon comments made by Vickers J. in ***Tsilhqot'in Nation v. British Columbia***, 2007 BCSC 1700. Mr. Howard then described Klahoose use and occupation in the area of the proposed FSP.

[100] The second argument was that the FSP review and approval process breached the honour of the Crown by failing to meet the Crown's duty to consult, which Mr. Howard put at the high end of the ***Haida*** spectrum (as do I). This argument was based upon two propositions: that the legislative scheme set out in the FRPA and the FPPR contained inherent barriers that precluded meaningful consultation, and that there

had been insufficient information provided to Klahoose to enable meaningful consultation. The alleged barriers in the legislative scheme consisted of a lack of power on the part of the district manager to make changes to the draft FSP where the default result or strategy set out in the FPPR had been adopted for particular values, and the statutory objective set out in sections 5 through 9.2 of the FPPR that gave priority to supply of timber over non-commercial forest values and attributes that would support the continued exercise of Klahoose title and rights. In short, Mr. Howard maintained that the scheme did not permit sufficient flexibility to make consultation meaningful.

[101] With respect to the need for information, Mr. Howard stated that the province had consistently failed to answer Klahoose's requests for information regarding Hayes' proposed operations, in the absence of which it was not feasible for Klahoose to assess whether the management strategies and results stated in the FSP would protect or minimally impair Klahoose's title and rights. In addition, Klahoose wanted further information regarding the reliability of the inventory data for the FSP area which Klahoose understood was several decades old and therefore unreliable, and further information regarding the relationship between the draft FSP and Hayes' annual allowable cut ("AAC") for TFL 10.

[102] The third argument was that the content of the draft FSP was deficient, in that it failed to meaningfully address and accommodate impacts to Klahoose, and failed to achieve the objectives set by government. Mr. Howard was particularly critical of the proposed strategies relating to Cultural Heritage Resources, Wildlife, Wildlife and Biodiversity Landscape and Stand Level, and Access Management.

[103] Mr. Howard concluded as follows:

> The approval of the draft FSP as it presently stands cannot be reconciled with MOF's constitutional duties and powers. Accordingly, the draft FSP should be rejected.
>
> MOF should advise Hayes that it is not prepared to entertain a substantially similar FSP application, until the underlying problem with Hayes' approach to the management of TFL 10 are addressed. In particular:
>
> - The problem of out-of-date forest inventory and habitat data must be addressed.
>
> - Hayes must present a plan that applies to all of TFL 10, which is the management unit that has applied since the TFL was first created.
>
> - Hayes must demonstrate that it can access the TFL and remove the timber it will harvest.
>
> In the event that MOF nonetheless continues its review of this draft FSP, Klahoose expects MOF to comply with the letter and the spirit of the Forest and Range Opportunities Agreement ("FRO") agreed to between Klahoose and the Ministry of forests ("MOF"), and provide further information requested below in preparation for further meetings with Klahoose, as provided in Appendix B to the FRO:
>
> - The inventory and habitat data relied on by Hayes and MOF in preparing and reviewing the draft FSP.
>
> - How the AAC for TFL 10 will be harvested in light of the limited area proposed for the FSP.
>
> - Hayes' plan for accessing the FDU area.
>
> - An explanation of the stream classification system used by Hayes and information identifying the Stream class of each of the streams within the FDU.
>
> - An explanation of how Hayes calculated the identified wildlife habitat and adopted the proportional target for the FDU area.

[104] Mr. Shaw deposed that upon receipt of this letter, he reviewed it with the district manager, the respondent Brian Hawrys. He then proceeded with a more detailed review of the letter and spent several weeks researching the issues, including reading the research report concerning the Klahoose First Nation strength of claim (referred to in paragraph 50, *supra*). On the basis of his research, Mr. Shaw determined the locations of former Klahoose village sites in the Toba River Valley, and noted that they appeared to be within the area included in the FSP, and reported this to Mr. Hawrys.

[105] I pause to point out that the research report was prepared "*in support of* a preliminary assessment of strength of claim for the Klahoose First Nation" [emphasis added], and consists of a survey of such "historical, ethno-historical and archaeological data as is readily available and potentially useful...". The report does not in fact purport to make any preliminary assessment of the strength of claim.

[106] Further, Mr. Shaw had discussions with Chuck Anderson, as a result of which between January 14 and 16, 2008, Mr. Anderson on behalf of the Ministry contacted Hayes to request certain changes to the "cultural heritage resources" strategies of the FSP. Hayes revised the FSP again, as a result of those discussions, and submitted the further revised FSP for approval on January 18, 2008. That January 18 draft was subsequently approved by the district manager on, as we have seen, February 15, 2008. Neither the nature of the changes requested by the Ministry, nor the actual revisions, were discussed with Klahoose beforehand.

[107] Clause 3.6.1 of the FSP, relating to Cultural Heritage Resources had originally read in part as follows:

> The Licensee carrying out timber harvesting and road construction subject to this FSP adopts as a result or strategy the following:
>
> 1. Timber harvesting and road construction will not cause a Cultural Heritage Resource that is, in the context of a traditional use by an aboriginal people, based on input from an aboriginal people and, in consultation with the aboriginal people determined to be:
>
> a) important;
> b) valuable;
> c) scarce; ***and***
> d) of continued and/or historical importance
>
> to become unavailable for its continuing extent of use by an aboriginal people… [emphasis added].

[108] In the final draft, the conjunction "and" in 1(c) was changed to "or". Changes were also made to the old growth management strategy and the wildlife strategy.

[109] On February 1 and 5, 2008, Mr. Shaw and other representatives of the Ministry met with legal counsel for the Ministry of the Attorney General to discuss the issues raised by Mr. Howard in his January 9 letter, and the strength of claim research report. As a result of those meetings, the Ministry concluded that it would be prudent to raise with Hayes the possibility of setting aside an area within the FDU encompassing the likely village sites within the Toba River Valley floor. On February 11, 2008, Mr. Hawrys sent an e-mail to Mr. Anderson "for the file" stating that:

> Over the last couple of weeks I have had a number of conversations with Donald Hayes. I have advised there is a strength of claim analysis that identifies one or possibly two village sites within the FDU. Donald was previously unaware of such sites but quickly described such sites as "no go zones" and wants to incorporate such information into future planning. As my previous e-mail indicated Hayes will meet as often as necessary with Klahoose as Hayes develop more specific plans.

[110] My own review of the research report suggests that four village sites had been identified within the FDU.

[111] Mr. Shaw and his colleagues met with Hayes to discuss this on February 12, 2008, as a result of which meeting, Hayes wrote to Mr. Hawrys on February 14, 2008 (the day before Mr. Hawrys approved the FSP), stating as follows:

> We are writing to you further to our FSP application for TFL 10. Since the time we submitted the FSP, we have been advised of a possible Klahoose village site or sites within a part of or adjacent to the FDU.
>
> In accordance with section 3.6.1 on page 10 of our FSP, we have concluded that Hayes should make accommodation with respect to potential harvesting and road construction within the sites in the immediately adjacent area (the "Sites") until such time that the Sites can be more fully explored in the context of a traditional use of the Klahoose and their importance, value, scarcity or continued and/or historical importance.
>
> Accordingly, attached please find a map which indicates an "accommodation" area (the "Area"). The boundaries of the Area have been set to capture the majority of the valley floor within the FDU. The Toba River in itself is excluded from the Area as is any private land within the boundaries of the area. A minor portion of the North Valley floor has been excluded from the Area because of existing licenses of occupation and development activities related to the Plutonic project.
>
> Hayes will not harvest timber or carry out road construction within the Area until this matter is more fully explored. Operations in these areas shall be limited to incidental use including use of existing roads and infrastructure or roads and infrastructure built subsequently by others (if any).

[112] The "Temporary Accommodation Area" thus designated covers the narrow floor of the Toba River Valley essentially from the eastern edge of IR #1 to a little east of the river's confluence with the Little Toba River. No attempt was made to review this with Klahoose either in concept or in final form prior to the approval of the FSP.

[113] In the meantime, Mr. Howard had written to Mr. Hawrys on February 12, noting that his letter of January 9 to Mr. Shaw remained unanswered. He emphasized the Klahoose sought a meaningful consultation regarding Hayes' proposed operations in the TFL as a whole, and again raised concerns about the lack of attention to the access that was available to Hayes.

[114] Klahoose learned of the Temporary Accommodation Area from Mr. Shaw who wrote to Mr. Howard on February 15, 2008, to respond to Mr. Howard's letter of 9, and to advise of the approval of the FSP.

[115] Mr. Shaw noted that Mr. Howard had outlined a number of aboriginal rights that Klahoose practised adjacent to and within the proposed FSP area, and announced that in light of that information, the FSP holder had agreed to the Temporary Accommodation Area, a map of which was attached. Mr. Shaw pointed out that the FSP included an information sharing process whereby Klahoose would have an opportunity to review site-specific information regarding proposed harvesting and road building activities, in response to which it could provide detailed information with respect to potential impacts on asserted aboriginal rights.

[116] Mr. Shaw disagreed with Mr. Howard's point that the legislation contained barriers to consultation, stating:

> The Forest Planning and Practices Regulation (FPPR) does obligate a plan proponent to make efforts to meet with First Nations to discuss the plan. MoFR still has the duty to consult and in fact has undertaken a process to consult with Klahoose regarding this plan, and as a result of consultation and consideration of the possible strength of claims of Klahoose in the FDU area has worked with the licensee to effect a

> commitment to forgo harvesting in the valley bottom area as an accommodation while the nature of that claim is more fully considered over time.

[117] This, of course, was news to Klahoose. After responding to a number of other matters raised by Mr. Howard, Mr. Shaw concluded as follows:

> In conclusion, although there are elements of the plan that are defaults and therefore would be deemed to meet the approval test, this does not preclude the requirement for First Nation consultation and determining if there needs to be any mitigated action taken on a site-specific basis to avoid or minimize potential infringement of an aboriginal interest. Given the nature of required FSP content and your concern that there isn't enough detailed information, this will be best accomplished at the operational level when more detailed information will be available and prior to the issuance of cutting permits.

[118] On February 15, 2008, Hayes wrote to Chief Brown to advise that the FSP had been approved, stating:

> We want to take this opportunity to assure you that we will comply with the terms of the FSP which we believe addresses the concerns you have expressed to us. We'll continue to consult you in respect of the TFL and are available to meet with you to discuss our operations at any reasonable time you may request.
>
> We take this opportunity to once again reach out to you and ask you if you might reconsider our proposal to work cooperatively in the TFL and create a business venture together. We continue to be open to considering any reasonable proposal in this respect.

[119] Nowhere in the materials is there any indication of to what conclusion Mr. Shaw, Mr. Hawrys or anyone else within the Ministry came concerning the strength of the case supporting the existence of Klahoose's right or title, or the seriousness of the potentially adverse effect upon it. As noted in ***Haida***, *supra* at para. 39, such an analysis would be necessary to establish the scope of the Crown's duty to consult. There is no evidence

of the analysis having been undertaken here, although I infer that the Ministry paid at least some attention to the concept when it concluded that it would be prudent for some alterations to be made to the FSP, and for the Temporary Accommodation Area to be put in place.

[120] Since then, Klahoose gave notice to the Ministry and Hayes of its intention to bring these proceedings, while Hayes gave notice of its intention to apply for a cutting permit, and of its application to the Integrated Land Management Bureau for authority to build and operate a "barge grid" (a barge docking and loading facility) on the Toba River. Klahoose takes the position that this was the type information it sought in vain from Hayes and the Ministry in order to be able to assess the implications of Hayes' operations for its aboriginal title and rights. Klahoose further takes the position that such a development would pose a risk of serious harm to the river and the fisheries upon which Klahoose relies. Hayes then advised Klahoose that it would be submitting an FSP amendment, essentially expanding the boundaries of the FSP from the original FDU to the entire area of TFL 10. As far as I am aware, all of these matters remain pending.

I. Adequacy of Consultation

[121] For the reasons articulated above, I have concluded that the scope of the Crown's duty to consult with and accommodate Klahoose in this case lay at the high end of the spectrum described by the Chief Justice of Canada in the ***Haida*** case. Whether the representatives of the Ministry of Forests and Range who dealt with this

matter came to the same conclusion is unknown to me. If they did not, they were in my respectful view incorrect.

[122] Regardless, the issue now becomes whether the consultation process that in fact took place, as outlined in the previous section, was adequate in view of the scope of the duty. This involves considering, first, the adequacy of the process of consultation, and secondly, the adequacy of any resulting accommodations. I reiterate the words of McLachlin CJC in ***Haida***, *supra* at para. 44, where the Chief Justice noted that at the high end of the spectrum, "deep consultation, aimed at finding a satisfactory interim solution, may be required". Such consultation could include such matters as formal participation in the decision-making process.

[123] I have come to the conclusion that neither the process of consultation, nor the resulting accommodation, was adequate in this case.

[124] With respect to the process, I find it difficult even to describe it as "consultation". While some information was indeed supplied by the Ministry in response to requests from Klahoose, much meaningful information was not. Indeed, Mr. Howard's letter of January 9 received no response at all until the approval had in fact taken place. In the meantime, Klahoose was not provided with revised drafts of the FSP as they were submitted to the Ministry, was not shown any operational information despite repeated requests, was given no information concerning access plans and plans for the remainder of the tree farm licence, and was not permitted to participate in any of the discussions between the Ministry and Hayes concerning suggested accommodations.

[125] Hayes has criticized what it describes as the "minimal information provided by the Klahoose in this case" to support its claim for aboriginal rights, and has argued that Klahoose cannot now assert that the consultation was based on an incorrect assessment of the strength of its claim, and was therefore inadequate, when it did not provide information that would allow such an assessment during the time that the FSP was under consideration.

[126] I reject that submission. It is true that the evidence provided by Klahoose was not as extensive as that which appears to have been provided in cases such as ***Haida*** and ***Leighton v. Canada (Minister of Transport)***, 2006 FC 1129. No doubt the information will continue to be developed. But the information concerning the basis for Klahoose's assertion of aboriginal rights and title that was summarized in Mr. Howard's letter to the Ministry of January 9, 2008, was surely not intended to be the final word. It will be recalled that the Ministry's reaction to that letter was to carry out research, none of which was shared with Klahoose, including a review of the research report. It is as though the Ministry had not given any thought to the issue of strength of claim before this. But instead of consulting with Klahoose about the results of that research, the Ministry dealt hastily with Hayes to make revisions to the FSP of which Klahoose was unaware, and then swiftly approved it. The Ministry never did articulate an assessment of Klahoose's strength of claim. It certainly never discussed it with Klahoose.

[127] In these circumstances, I find that Klahoose is entitled to rely on the evidence introduced at this hearing (which is essentially an expansion of what was summarized

by Mr. Howard in his letter of January 9), together with the province's research report, in asserting that the consultation was inadequate in view of the strength of its claim.

[128] In many other instances, the Ministry's response to Klahoose's requests for information consisted of advice that the licensee was not required to provide such information when submitting an FSP for approval, or that the more appropriate time for deal with such requests would be in the context of operational decisions such as applications for cutting permits, when opportunities for further consultation would arise.

[129] I do not consider that to be an adequate response. The relationship of an FSP to the harvesting of timber or construction of a road (the two acts which have the potential for negative impact on the landscape) is made clear by s. 3(1) of the FRPA. Where the duty to consult is deep, it is not an answer to say that there will be further opportunities for consultation when the process that may lead to harm is further advanced, or that the information sought, while important, is not part of the process at this stage.

[130] This is implicit in both s. 77.1(1) of the FRPA, which provides wide powers of intervention by the Ministry after an FSP is approved, and the consultation protocol in the FRO. Moreover, it is consistent with the approach taken by the Supreme Court of Canada in the ***Haida*** case where the failure of the province to consult in relation to the replacement of a TFL was considered a breach of the Crown's duty, notwithstanding that the Crown had consulted and continued to consult before authorizing any cutting permits or other operational plans. The Court noted that, "Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title" (*supra* at para. 76).

[131] Finally, it is consistent with the observations of the Court of Appeal for British Columbia that the constitutional duty to consult and accommodate is "upstream" of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution: see ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, 1999 BCCA 470, 178 D.L.R. (4th) 666 at para. 177, and ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 BCCA 128 at para. 19.

[132] As I noted earlier in these reasons, the respondents have taken the position that the actions of Klahoose over the course of the FSP approval process indicated a failure on the First Nation's part to fulfill its reciprocal obligation to carry out its end of the consultation. Both the ***Haida*** case and the FRO Interim Consultation Protocol make it clear that the obligation is indeed reciprocal. Hayes points to requests made of Klahoose to clarify what information it required, and Hayes' expressions of an ongoing willingness to respond.

[133] I am unable to agree with this characterization of Klahoose's behaviour. Klahoose and Hayes were involved not only in the process of approving the FSP, but also in negotiations for the purchase of the TFL. Those negotiations were hard-nosed. Each side attempted to build a position of strength: Klahoose through its continued denial of access to the watershed through IR #1, and Hayes through its avowed intent to build the value of the TFL by bringing it into commercial operation. They were both entitled to those positions.

[134] I find no evidence in the record, however, that Klahoose attempted to frustrate the consultation process by refusing to meet or participate in meetings, or by imposing unreasonable conditions; see ***Halfway River First Nation****, supra* at para. 161. While making it clear it did not want Hayes or anyone else to log the area, Klahoose never took the position that it would not participate in any consultation process which would have that result. What Klahoose insisted on was information that related to the whole of the TFL, as opposed to a piecemeal approach, and operational information that would permit it adequately to assess the impact. I do not consider that to be unreasonable; see ***Tzeachten First Nation v. Canada (Attorney General)***, 2008 FC 928 at para. 64-69.

[135] That is not to say that Hayes was in any way unreasonable. Indeed, some of the information requested by Klahoose in Mr. Howard's letter to the Ministry of January 9 was provided by Hayes in a letter to Mr. Shaw of the SCFD dated January 18, 2008. The record does not indicate, however, any transmission of that information from Mr. Shaw to Klahoose before the approval occurred. It must be remembered, of course, that the duty to consult and accommodate belongs to the Crown. It is not Hayes' duty.

[136] Turning to the Temporary Accommodation Area that was agreed to between the Ministry and Hayes, setting aside a temporary no-go zone on the Toba River valley floor, I am satisfied that it was a genuine attempt by both the Ministry and Hayes to respond to concerns raised by Klahoose, and to accommodate them. It demonstrates the sort of step that can be taken in this process of attempting to find a satisfactory

interim solution. The problem is that Klahoose was not involved in the process. Nobody asked Klahoose whether it was satisfactory. Klahoose had no input into it at all.

[137] In these circumstances, I am unable to accept the respondents' submission that the accommodations made in this case were adequate

[138] It follows that I find that the Crown, through the Ministry of Forests and Range, failed to fulfill its duty to engage in appropriately deep consultation with Klahoose, and to accommodate Klahoose's interests adequately, in the course of reviewing and approving Hayes' FSP.

J. Remedy

[139] I described the remedies sought by the petitioner in paragraph 4 of these reasons. In essence, Klahoose seeks an order quashing the FSP approval in order to ensure that a meaningful process of consultation and accommodation takes place, beginning anew from a proper starting point.

[140] The Crown submits that if I should find, as I have, that the Ministry, through the district manager, did not meet its duty of consultation and accommodation concerning the FSP decision, then the appropriate remedy would be a declaration to that effect, with liberty to the parties to apply with respect to any question relating to the duty. In the Crown's submission, an order quashing the FSP would, at the very least, create substantial uncertainty regarding the rights of tenure holders under the ***Forest Act*** and would, potentially, prejudice their abilities to initiate and/or continue timber harvesting operations. The Crown argues that setting aside the FSP at this stage would do little to

advance the goal of effecting reconciliation of the interests of the Crown and Klahoose. Hayes supports that position, noting that it has already invested considerable resources in moving the TFL towards commercial operation, as it is entitled to do.

[141] Those concerns were considered by MacKenzie J., as he then was, in ***Klahoose First Nation v. British Columbia (Minister of Forests)*** (1995), 13 B.C.L.R. (3d) 60, but that case concerned a very different situation, and was decided almost a decade before ***Haida***.

[142] In the circumstances before me, it is difficult to see how the district manager's decision approving the FSP can stand given that it was taken without meeting what I have found to have been the Crown's constitutional duties. Because of that failure, there was inadequate accommodation, and the decision therefore did not appropriately balance societal and aboriginal interests.

[143] Nevertheless, I am cognizant of my obligation to be flexible and to approach this case individually: ***Haida***, *supra* at para. 45. In that context, I note the following relevant factors.

[144] First, Hayes is the lawful holder of TFL 10 until such time as it comes up for renewal, or Hayes transfers the licence to another party. This tree farm license gives it the right to harvest timber in the Toba River watershed, which right is not in issue in this proceeding. It does not give Hayes any right to access through IR #1.

[145] Second, Klahoose is not entitled to a veto in relation to the granting of an FSP to Hayes.

[146] Third, one of the objections of Klahoose to the FSP was the piecemeal approach taken by Hayes by focusing on an FDU that covered only a small part of TFL 10, whereas Klahoose's interests run throughout the entire watershed that TFL covers. On February 29, 2008, Hayes submitted an application to amend its FSP by expanding the proposed FDU over the entirety of TFL 10. This would, among other things, enable the AAC to be harvested over a larger area, and would go some distance to meeting Klahoose's piecemeal approach objection.

[147] Fourth, since the FSP was approved on February 15, 2008 (if not before as maintained by Klahoose), Hayes has developed a good deal of the operational information that Klahoose had sought, including access plans and maps showing detailed cutblock layouts.

[148] Fifth, I anticipate that both Klahoose and Hayes may have developed further archaeological and ethno-historical data in recent months.

[149] Sixth, the world has changed significantly since the hearing of this petition in June of 2008.

[150] In these circumstances, I conclude that rather than setting aside the impugned FSP, the appropriate remedy would be to order a stay of all further activity and operations occurring under it, with the exception of the amendment application to extend the FDU to the entirety of TFL 10. That application, in my mind, should now be considered by the district manager as a new FSP (which is how I understand the application for such an amendment is approached in any event), in accordance with

what I have found to be the Crown's duty of deep consultation, aimed at finding a satisfactory interim solution.

[151] Such a solution would, one hopes, permit appropriate harvesting of timber resources while adequately protecting the economic, cultural, spiritual and social interests of Klahoose in the Toba River watershed. Klahoose's interest, after all, has not been to eliminate forestry operations in the watershed, but rather to ensure that they are sustainable, environmentally sound and consistent with a long-term vision for the future. Klahoose's desire to have complete control of forestry operations in TFL 10 is not an outcome that can be forced through this process. Although it is an attractive solution, it must be achieved, if at all, through other means.

[152] The consideration of the application to amend the FSP would, I expect, involve an appropriate sharing of information, including information that may not be statutorily required in relation to an FSP, such as operational and access information. It would also involve Klahoose directly in the decision-making process concerning any accommodation of Klahoose's rights.

[153] I invite the parties to prepare a form of Order setting out the appropriate declaratory and injunctive relief in accordance with these reasons. If the parties believe that further submissions are necessary, they may arrange a date with the registry.

[154] I am inclined to award costs to the petitioner and to the respondent Hayes against the respondent Crown, on scale C, but the parties are at liberty to speak to costs if there are factors presently unknown to me that ought to be taken into account.

"GRAUER, J."

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[1] As quoted in Ronald Wright: *A Short History of Progress* (Toronto, 2004)

GLOSSARY

AAC	Allowable Annual Cut
FDU	Forestry Development Unit
FPPR	Forest Planning and Practices Regulation
FRO	Forest and Range Opportunities Agreement
FRPA	Forest and Range Practices Act
FSP	Forest Stewardship Plan
Hayes	Hayes Forest Services Limited
IR	(Klahoose) Indian Reserve
Klahoose	Klahoose First Nation
Ministry) MOF) MoFR)	Ministry of Forests and Range
Research report	<u>*Klahoose First Nation*</u>*: Research in support of a preliminary assessment of strength of claim for the Klahoose First Nation* (February 27, 2007)
RPF	Registered Professional Forester
SCFD	Sunshine Coast Forest District
TFL	Tree Farm Licence